IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1650

MR. STEAK, INC.,
JAMES A. MATHER, DONALD J. FOLTZ,
JAMES C. SHEARON, LOUIS J. LEVINSON,

Petitioners,

—v.—

HARRY L. HELLERSTEIN,

Respondent.

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM E. HAUDEK
295 Madison Avenue
New York, New York 10017
Attorney for Respondent
Harry L. Hellerstein

Of Counsel
DANIEL W. KRASNER

June 21, 1976

TABLE OF CONTENTS

TABLE OF CASES

Statutes and Regulations

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1650

MR. STEAK, INC.,
JAMES A. MATHER, DONALD J. FOLTZ,
JAMES C. SHEARON, LOUIS J. LEVINSON,

Petitioners,

—v.—

HARRY L. HELLERSTEIN,

Respondent.

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

In this class action on behalf of purchasers of common shares of defendant Mr. Steak, Inc. alleging violations of § 11 of the Securities Act of 1933, the District Court for the District of Colorado (Chilson, J.) granted plaintiff's motion for class suit certification pursuant to FRCP 23(b)(3). Mr. Steak appealed the District Court's interlocutory order, but the Tenth Circuit unanimously dismissed the appeal for lack of appellate jurisdiction (A-3; reported, 531 F. 2d 470 (10th Cir. 1976)). Defendant-petitioners, Mr. Steak and four of its directors, now seek certiorari.*

---

* Defendants Mather, Foltz, Shearon and Levinson did not appeal the District Court's order (A-3) but are named as petitioners herein.

Question Presented

Could petitioners appeal as a matter of right from the interlocutory order of the District Court certifying a class action?

Statement of the Case

Plaintiff commenced this action as a class suit on behalf of all purchasers of Mr. Steak common shares between April 22 and August 31, 1969. The shares in question represented an initial public offering of Mr. Steak shares. They were sold to the public pursuant to a registration statement and prospectus which became effective April 22, 1969. Defendants are the issuer and its principal officers, directors and shareholders as of the effective date of the prospectus and registration statement. Plaintiff claims that the prospectus, by omitting highly material facts with respect to Mr. Steak's franchise operations and financial condition, violated § 11 of the Securities Act of 1933, 15 USC § 77k.

Plaintiff moved for class suit determination. Defendants, opposing the motion, asserted that plaintiff would not fairly and adequately protect the interests of the class because he was guilty of laches in not commencing this action sooner and because he failed to join the underwriters of the Mr. Steak public offering as defendants.

After hearing counsel the District Court requested additional affidavits regarding the estimated size of the class and the proposed method of giving notice under FRCP 23(c)(2). Plaintiff estimated that the Rule 23 notice would go to approximately 4,000 to 5,000 persons, 40% to 50% of whom would qualify as class members (R. 132-151).* Plaintiff proposed to give notice to all class members by

* "R" refers to the Record below.

direct mail at his own expense (R. 137). Defendants did not dispute plaintiff's estimate of the size of the class or the method proposed for giving notice.

The District Court granted plaintiff's class action motion (A-1). It found—

> "That all of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure have been met, and in addition, that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of this controversy." (A-2)

The order included an appeal certificate under 28 USC § 1292(b). Mr. Steak, however, did not apply to the Tenth Circuit for permission to appeal pursuant to § 1292(b) and FRAP 5. It chose instead to prosecute its appeal under 28 USC § 1291.

The Court of Appeals, without reaching the merits, dismissed the appeal for lack of appellate jurisdiction. The Court concluded (A-5) that—

> "an order of a trial court which merely grants a request that an action proceed as a class action under Fed. R. Civ. P. 23 is not a final decision under 28 U.S.C. § 1291 and hence notice of appeal will not lie to such an order."

REASONS FOR DENYING THE WRIT

POINT I

The petition presents no question warranting review by this Court.

1. Since the First Judiciary Act of 1789, the rule against piecemeal appeals has been the firm policy of the federal courts; *Cobbledick* v. *United States,* 409 U.S. 323 (1940). The rule, now embodied in 28 USC § 1291, requires a "final decision" for appeal purposes.

Under FRCP 23(c)(1), an order granting or denying class action status "may be altered or amended before the decision on the merits." Consequently, it has been held not to be a "final decision". *Blackie* v. *Barrack,* 524 F. 2d 891, 897 (9th Cir. 1975), cert. petition pending; *In re Cessna Aircraft Distrib. Antitrust Litigation,* 518 F. 2d 213, 215 (8th Cir.), *cert. denied* sub nom. *Cessna Aircraft Co.* v. *White Industries,* U.S. , 96 S. Ct. 369 (1975); *Rodgers* v. *United States Steel Corp.,* 508 F. 2d 152 (3rd Cir.), *cert. denied,* U.S. , 96 S. Ct. 54 (1975); *Walsh* v. *City of Detroit,* 412 F. 2d 226 (6th Cir. 1969); *Thill Securities Corp.* v. *New York Stock Exchange,* 469 F. 2d 14, 17 (7th Cir. 1972); *Seiffer* v. *Topsy's International, Inc.,* 520 F. 2d 795 (10th Cir. 1975), *cert. denied,* U.S. , 96 S. Ct. 779 (1976). See also *Esplin* v. *Hirschi,* 402 F. 2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969); *Gerstle* v. *Continental Airlines, Inc.,* 466 F. 2d 1376, 1377 (10th Cir. 1972).

In the past eighteen months this Court has thus denied certiorari in at least three cases involving the identical issue raised here: the appealability of an order certifying class action status. The case at bar presents no other or better grounds for review than did *Cessna Aircraft, supra, Rodgers, supra,* and *Seiffer, supra.*

2. Defendants invoke the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). The argument is boiler plate; there—

> "appears to be an irresistible impulse on the part of appellants to invoke the 'collateral order' doctrine whenever the question of appealability arises". *Borden Co.* v. *Sylk,* 410 F. 2d 843, 845-46 (3rd Cir. 1969)

The collateral order doctrine has been thoroughly developed by this Court in three major decisions: *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. 541; *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964); and *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). The rule having thus been settled, its further application depends on an infinite variety of circumstances presented from case to case. Such individual determinations are the task of the Courts of Appeals. If they observe the standards laid down by this Court—as did the Court below—there is no occasion for this Court to further settle an "important question of federal law" or to exercise its "power of supervision" (Rule 19(1)(b) of this Court).

The decision below is not in conflict with any decision of this Court.

Contrary to petitioners' assertion, the decision below is in complete harmony with *Cohen, supra* (337 U.S. 541), and its progeny, including *Eisen, supra* (417 U.S. 156).

In *Cohen,* this Court carved out a limited exception to the finality doctrine: An immediate appeal under § 1291 lies only where a decision "finally" determines claims "separate from and collateral to rights asserted in the action too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (337 U.S. at 545-47).

The class order here in question meets none of these criteria.

(a) In the District Court petitioners urged that plaintiff is an inadequate class representative because of his alleged laches and abuse of process (see Pet. 6). These contentions go far into the merits; in fact, petitioners presented them by a motion to dismiss, which the District Court denied, *Hellerstein* v. *Mather,* 360 F. Supp. 473 (D. Colo. 1973). Since the class suit issues thus overlap the merits, the class order is not appealable even if all other conditions of *Cohen* were met. In the language of *Cohen, supra,* the class issues are not "separable from" the rights asserted in the action.

(b) An order granting or denying class action status does not "finally determine" the class suit question, as required by *Cohen.* Under FRCP 23(c)(1), a class suit determination may be altered or amended at any time prior to the entry of final judgment.

(c) Since a class suit order is appealable after the entry of final judgment, *Esplin* v. *Hirschi, supra,* 402 F. 2d 94, the third criterion of *Cohen* is likewise absent here. Review may be delayed, as it is for all interlocutory orders, but it will not be denied at the proper time.

(d) Even where a District Court "finally" determines a collateral right, its decision is appealable under the *Cohen* rule only if "a serious and unsettled question" has been presented (337 U.S. at 547). There is no such question here. A class suit order is "a discretionary decision, the propriety of which will necessarily vary from case to case"; *General Motors Corp.* v. *City of New York,* 501 F. 2d 639, 647 (2nd Cir. 1974). Moreover, these petitioners could have prosecuted their appeal under § 1292(b). Their failure to seize that opportunity should not be rewarded by an *ad hoc* expansion of the *Cohen* doctrine.

Nor is this Court's decision in *Eisen* (417 U.S. 156) authority for petitioners' appeal. Indeed, it points in the opposite direction. The Second Circuit had broadly held that an order granting class action status was appealable; *Eisen* v. *Carlisle & Jacquelin,* 479 F. 2d 1005 (2d Cir. 1973). This Court vacated the broad holding of the Court of Appeals and sustained the appeal only with respect to the District Court's improper allocation of the class notice costs (417 U.S. at 172). In the present case, the District Court's order did not deal with the class notice; *Eisen* is, therefore, inapplicable.

In sum, there exists no conflict between the decision below and any decision of this Court.

The decision below is not in conflict with those of the Second Circuit.

Petitioners contend that the decision below refused to adopt the so-called three-pronged test of appealability developed by certain earlier decisions of the Second Circuit. *Kohn* v. *Royal, Koegel & Wells,* 496 F. 2d 1094, 1098 (2d Cir. 1974); *General Motors Corp.* v. *City of New York, supra,* 501 F. 2d at 504. Under that test, a class suit order would be appealable if the order is "fundamental" to the case, if its review is "separable from the merits", and if the class action is so "huge" that defending it would cause irreparable harm to the defendant. Petitioners completely fail to show that application of this test would support their appeal; plainly it would not since, as previously noted, review of the present class suit order is not "separable from the merits" and the present class is anything but "huge".

What is more, the most recent decision of the Second Circuit on the subject, *Parkinson* v. *April Industries,* 520 F. 2d 650, 658 (2d Cir. 1975), holds that no appeal lies from a—

> "discretionary ruling of the district judge that the prerequisites of Rule 23(a) and the requirements of Rule 23(b)(3) have been satisfied."

The District Court's decision in the case at bar was precisely such a "discretionary ruling". Accordingly, the dismissal of the appeal from that decision is in full agreement with the rule of the Second Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
June 21, 1976.

Respectfully submitted,

WILLIAM E. HAUDEK
295 Madison Avenue
New York, New York 10017
Tel. No. 212-532-4800

Attorney for Respondent
Harry L. Hellerstein

Of Counsel
DANIEL W. KRASNER